

Lockdown, a good time to run a sanity check

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What a good time to assess the legal robustness of its existing transactions and investments! Many of our clients have taken the time during this period to run a sanity due diligence on the existing transactions and ensure that in spite of the COVID-19 expected impact on the business, the legal documentation is still solid and up-to-date.

In addition to the best practices suggested in the publication by the Fund Finance Association of the paper “Fund Finance Association – Covid – 19 Response”, we would also propose a practical approach for lenders allowing to run a quick sanity check and rapidly verify that the financing in place is, from a legal point, of view, still in order.

Generally speaking, during the life time of a credit facility, indistinctly whether it is structured as short term subscription line or mid-long term NAV facility, many changes can occur in practice in relation to the borrower, the guarantors and the investors such as:

- (a) structural – transfers in the shareholding, entering of new investors, resignation of the GP, withdraw of the depositary, changes of the bank account;
- (b) economic – devaluation of assets, transfers in the underlying assets, transfer of cash, change of ratios, additional borrowings;
- (c) conjectural – NAV calculation suspension, *force majeure* events, etc.

Those changes may or may not have been agreed, accepted or are merely forbidden by the finance documents but have an impact on the level of risk or the effectiveness of the security interest granted in favour of the lenders.

The checklist proposed below is a non-exhaustive list and aims to provide the lenders with what should be, at a glance, checked.

Due authorisation/representation of the fund

✓ who has authority to represent the fund and to make capital calls?

✓ have there been any changes in the chain of authority since the signature of the finance documents?

Depositary

✓ who is the depositary?

✓ has the depositary changed since the signature of the finance documents? If so

✓ has the new depositary been informed/notified/has consented of the financing in place?

Investors

✓ have the investors been informed of the financing in place? By which means, email/through information report?

✓ have the investors been notified of the pledge over capital calls?

✓ has the notification been properly sent:

➤ was the address used the same as the one included in the pledge agreement;

➤ was the right person notified;

- the means of notification where the ones agreed in the financing documentation?
 - ✓ have additional investors entered into the fund since the security agreement been signed?
 - ✓ are the shareholders' and / or noteholders registers up-to-date?
 - ✓ have these new investors been notified/have they provided an acceptance letter?
 - ✓ have these new investors waived their defenses (setoff and similar rights)?
- Account Bank**
- ✓ has the account bank been notified?
 - ✓ has the account bank signed the acknowledgment?
 - ✓ has the account bank been provided with an up-to-date authorized signatory list from the pledgee?
- Other elements**
- ✓ have there been transfers in the underlying assets (of any kind, including shareholders' changes in the SPVs, new co-investors at the underlying level)?
 - ✓ have there been / are there early termination or suspension investment period events occurred?
 - ✓ have there been / are there shortfalls from defaulting investors to be cured?
 - ✓ are the overcall limitations in the fund documentation still compatible with the lenders' risk?
 - ✓ are the asset valuations still relevant / LTV?

In light of above, the lenders should envisage whether the finance documentation, including the security documents, should be renegotiated, amended, confirmed or acceded to.

With a strong expertise of our Fund Finance and Banking&Finance practice, we are happy to assist you, including with any request in relation to this topic.

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